No. 86-629 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1986

SEATTLE MASTER BUILDERS ASSOCIATION, ET AL., PETITIONERS

v.

PACIFIC NORTHWEST ELECTRIC POWER AND CONSERVATION PLANNING COUNCIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly sustained the validity of model energy conservation standards issued by the Pacific Northwest Electric Power and Conservation Council, a body established pursuant to federal statute and composed of eight persons appointed by the Governors of the four States in the Pacific Northwest.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A79) is reported at 786 F.2d 1359.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1986, and the petition for rehearing was denied on July 8, 1986. The petition for a writ of certiorari was filed on October 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

1. The Bonneville Power Administration (BPA) is a federal agency within the United States Department of Energy. Since 1937, BPA has been responsible for the marketing at wholesale of electricity generated by federal hydroelectric projects in the Columbia River Basin. 16 U.S.C. 832 *et seq.* For many years, BPA provided an ample source of electrical energy for numerous public and private utilities, other government agencies, and direct-service industrial customers (principally aluminum companies). By the 1970's, however, it appeared to many in the Pacific Northwest that BPA was approaching the limits of its ability to meet expanding load growth and that some system was required for the allocation of power among BPA's existing and potential customers. See *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility District*, 467 U.S. 380, 382-386 (1984).

Congress responded in 1980 by enacting the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. 839-839h. "The Act provided for future cooperation in the region by establishing a mechanism for comprehensive federal-state power planning. For the first time, moreover, BPA was authorized to acquire resources to increase the supply of federal power." *Central Lincoln*, 467 U.S. at 386 (citations and footnote omitted).[1] To assist BPA in its expanded plan-

[1] "Under the [Bonneville Project Act of 1937, 16 U.S.C. 832 *et seq.*], BPA did not have authority to own, construct, or purchase the output or capability of electricity generating plants except to meet short-term deficiencies; BPA was entirely a marketing agency that disposed of power generated at dams constructed by the Army Corps of Engineers and

ning and acquisition responsibilities, and to provide for cooperation between BPA and the four States that cover most of BPA's service area (Oregon, Washington, Montana and Idaho), Congress gave its consent to an agreement among those States for the establishment of a "regional agency" known as the Pacific Northwest Electric Power and Conservation Planning Council (the Council). 16 U.S.C. 839b(a). The Council is composed of eight members, with two members appointed by the Governor of each of the four affected States. The Northwest Power Act provided that the appointment of six members from at least three of the four States by June 30, 1981—six months after the Act was signed into law—"shall constitute an agreement by the States" (*ibid.*). The legislature of each of the four States enacted a law authorizing its Governor to appoint two members of the Council (Pet. App. A4), and the Council thus came into effect in 1981. The Northwest Power Act states that "[t]he members and officers and employees of the Council shall not be deemed to be officers or employees of the United States for any purpose" (16 U.S.C. 839b(a)(3)) and that except as otherwise provided in the Act, the Council "shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law" (16 U.S.C. 839b(a)(2)(A)(iv)).[2]

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what was then called the Bureau of Reclamation" (*Central Lincoln*, 467 U.S. at 386 n.5).

[2] Congress anticipated possible constitutional challenges to the Council because its members are appointed by the state Governors, rather than by the President or the head of a federal department, in the manner contemplated by the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. See 16 U.S.C. 839b(b)(1)(B). Accordingly, the Act provides

2. One of the principal responsibilities of the Council is to prepare and transmit to the Administrator of BPA a regional conservation and electric power plan (the Plan). 16 U.S.C. 839b(a)(1)(A) and (d). The Plan must set forth a general scheme for implementing conservation measures and developing resources in order to reduce or meet the Administrator's obligations to satisfy the projected demand for power in the region, with due regard for environmental quality, compatibility with the existing regional power system, and protection of fish and wildlife. 16 U.S.C. 839b(e)(2). The Act provides that following the adoption of the Plan, all actions of the Administrator of BPA concerning resource acquisition (see 16 U.S.C. 839d) shall be consistent with the plan, except as otherwise provided in the Act. 16 U.S.C. 839b(d)(2).[3]

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that if any provision of the Act relating to the establishment of the Council or to any substantial function or responsibility of the Council is held by a final decision of a federal court to be unlawful, or if the regional conservation and electric power plan (see pages 4-5, *infra*) is held to be ineffective because of the manner in which the members are appointed, the Secretary of Energy shall establish the Council as a federal agency. In that event, the members of the Council would be appointed by the Secretary, upon the recommendation of the Governors. 16 U.S.C. 839b(b)(1) and (2).

[3] The Act contains several other provisions regarding the relationship between the Council and BPA. For example, 16 U.S.C. 839d(c) prescribes elaborate procedures to insure that any major energy resources (including conservation measures) that the Administrator of BPA proposes to acquire are consistent with the Council's Plan. Similarly, 16 U.S.C. 839c(d)(3) provides that the Administrator may not make additional sales of power to direct-service industrial customers without the approval of the Council. These two provisions appear to give the state-appointed Council a veto au-

In identifying resources to meet future power needs, the Plan must give priority first to conservation, then to renewable resources and certain efficient generating methods, and finally to other resources. 16 U.S.C. 839b(e)(1). The Plan must also contain an energy conservation program, which in turn must include model conservation standards (MCS). 16 U.S.C. 839b(e)(3)(A). The purpose of the MCS is to reduce the future need for new generating capacity by encouraging more energy-efficient building practices in the region. The MCS must include standards for new and existing structures; conservation programs by utilities, customers, and governmental entities; and other consumer actions for achieving conservation. In addition, the MCS "shall reflect geographic and climatic differences within the region" and "shall be designed to produce all power savings that are cost-effective for the region and economically feasible for consumers," taking into account financial assistance available to consumers under 16 U.S.C. 839d(a), (839b(f)(1)).

To assure broad participation in the development of the MCS, the Council must consult with the Administrator of BPA and his customers, the four Northwest States, their political subdivisions, and the public. 16 U.S.C. 839b(f)(1). However, the Northwest Power Act does not provide any means by which the Council may directly impose the MCS on state or local governments or the builders or owners of structures. Congress's expectation, rather, was that the MCS would be regarded as consensus standards that would be enacted into law by the state and local governments in the region and be followed by BPA's

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thority over the actions of the Administrator in some circumstances. These provisions are not involved in this case.

utility and other customers. But in order to furnish an incentive to that end, the Act provides that the Council may "recommend" to the Administrator of BPA—and that the Administrator thereafter "may" impose—a surcharge on the rates charged to customers within States or political subdivisions that have not (or to BPA customers that have not) implemented conservation measures that achieve energy savings comparable to those attainable under the MCS. 16 U.S.C. 839b(f)(2). The Council recommended such a surcharge to the Administrator in 1983 and in 1985, but none has yet been imposed. See page 20, *infra*.

3. The Council promulgated model conservation standards as part of its 1983 Conservation and Electric Power Plan. 48 Fed. Reg. 24443 (excerpted at Pet. App. M1-M148). The standards for new residential construction, at issue here, consisted of a table that specified the maximum number of kilowatt hours per square foot required to heat single and multifamily buildings in different climate zones in the region (*id.* at M60-M61). The Plan stated that these thermal performance goals could be met by any means or combination of conservation measures, such as greater insulation, solar design, or geothermal heat (*id.* at M61). A technical appendix to the Plan offered a number of suggested approaches to achieving these goals, such as wall and ceiling insulation, glazing limitations, etc. (*id.* at M63-M64, N1-N4).[4]

4. a. Petitioners, a consortium of construction industry interests, challenged the 1983 MCS for new

[4] On December 4, 1985, the Council adopted certain amendments to the MCS, which were later incorporated into the 1986 amendments to the Plan. 51 Fed. Reg. 7364, 16239 (1986).

residential construction by filing a petition for review in the United States Court of Appeals for the Ninth Circuit, pursuant to 16 U.S.C. 839f(e)(1) and (5). They argued, inter alia, that the Council exercises substantial authority over the Administrator of BPA under federal law and that its members therefore must be appointed by the President or the head of a federal department, as required by the Appointments Clause of the Constitution (Art. II, § 2, Cl. 2), and cannot be appointed by the four Governors.

Because the constitutionality of an Act of Congress had been called into question, the United States intervened in the court of appeals pursuant to 28 U.S.C. 2403(a). The United States took the position that the court of appeals need not decide whether the Council as currently constituted may exercise all of the powers assigned to it by the Northwest Power Act, including those that appear to give the Council a veto over some actions of the Administrator of BPA. See note 3, *supra*. All that is involved in this case, the United States argued, is whether the Appointments Clause bars the state-appointed Council from issuing the MCS. Because the MCS do not have any binding legal effect in their own right—but serve merely as recommended standards for state and local governments and as the basis for a surcharge recommendation to the Administrator—the United States argued that the MCS properly could be issued by a body appointed by state governors.

b. A divided panel of the court of appeals rejected petitioners' Appointments Clause challenge and sustained the MCS (Pet. App. A1-A79). In addressing the constitutional issue, the court declined the United States' suggestion that it limit its discussion to the issuance of the MCS, the only power of the Council that was before the court.

The court of appeals first held that the agreement among the States authorized by the Northwest Power Act is within the scope of the Interstate Compact Clause of the Constitution (Art. I, § 10, Cl. 3) and that the Council therefore is a validly created interstate-compact entity, even though Congress largely dictated the terms of the States' participation and the Council's actions may directly affect BPA, a federal agency. The court observed that this Court has sustained the power of Congress to consent in advance to an interstate compact and to condition its consent on the States' compliance with specified terms (Pet. App. A12-A13, citing *Cuyler* v. *Adams*, 449 U.S. 433, 439-441 (1981)). The court also reasoned that it is not unusual for the federal government to be involved in or affected by an interstate compact (Pet. App. A13-A14), and that there is no constitutional prohibition against Congress's providing that a federal agency must adhere to requirements imposed by a state agency—or, accordingly, by an *interstate* agency created by compact (*id.* at A14-A15, citing *California* v. *United States*, 438 U.S. 645, 656-657 (1978)).

The court of appeals also rejected petitioners' argument that, even if the Northwest Power Act does authorize a valid interstate compact, the Council's members must be appointed in conformity with the Appointments Clause (Pet. App. A62-A79). In ~~his~~ the court's view, the Appointments Clause applies to (i) "all executive or administrative officers," (ii) who "serve pursuant to federal law," and (iii) who "exercise significant authority over federal government actions" (*id.* at A16, A17, citing *Buckley* v. *Valeo*, 424 U.S. 1, 123-127 (1976)). The court did not decide whether the first and third prongs of this

test were satisfied, because it found the Appointments Clause inapplicable to the Council under the second prong. The court reasoned that although federal law provides the necessary congressional consent for creation of the Council, constrains the Council's policy-making, and subjects its operations to some federal laws, "[t]he Council members do not perform their duties 'pursuant to laws of the United States' " (Pet. App. A17, quoting *Buckley* v. *Valeo*, 424 U.S. at 126), but rather serve pursuant to the state laws that provide for their appointment (Pet. App. A17-A19). The court also expressed the view that the Appointments Clause is addressed only to the separation of powers between the President and Congress, not between the Executive Branch and the States, and that no aggrandizement of Congress's powers is involved here because Congress neither appoints nor removes the members of the Council (*id.* at A16, A19-A20).

With respect to the statutory issues, the court of appeals held that the MCS are consistent with the requirements of the Northwest Power Act that the MCS be "cost-effective for the region" and "economically feasible for consumers" (Pet. App. A21-A44). The court also rejected petitioners' contention that the Council was required to comply with the environmental assessment statutes of each of the four participating States (*id.* at A44-A45). Similarly, the court held that the Council had not violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4331 *et seq.*, when it issued the MCS. Without deciding whether federal environmental statutes apply to the Council, the court concluded that neither the Council nor BPA had taken any major federal action significantly affecting the quality of the human environment that would trigger the NEPA requirement

that an environmental impact statement be prepared. Pet. App. A45-A46; see 42 U.S.C. 4332(C)(ii).

c. Judge Beezer dissented (Pet. App. A46-A79). Judge Beezer first concluded that the Council is a federal agency, not a bona fide interstate compact entity. He relied on three factors: (i) the States did not make an irrevocable commitment to the Council or condition their participation on the participation of the other States (*id.* at A51-A52, citing *Northeast Bancorp, Inc.* v. *Board of Governors*, No. 84-363 (June 10, 1985), slip op. 14-15); (ii) the Council's responsibilities extend to the entire BPA "region," including any of the four States that might have chosen not to participate as well as parts of other States (Nevada, Utah, Wyoming, and California) that are served by BPA (Pet. App. A52-A53); and (iii) the Council's sole function is to oversee the actions of a federal agency, rather than to coordinate energy and conservation planning at the state level (*id.* at A53-A57).

Judge Beezer further concluded that the validity of the members' appointment must be evaluated under the Appointments Clause even if the Council is a valid interstate compact entity. To allow Congress to vest substantive appointment authority in third parties, he reasoned, would enhance congressional authority at the expense of the Executive. Pet. App. A57-A62. In this case, Judge Beezer concluded that the Council as currently constituted does violate the Appointments Clause (Pet. App. A62-A79). In his view, under *Buckley* v. *Valeo*, *supra*, the Appointments Clause applies to any appointee " 'exercising significant authority pursuant to the laws of the United States,' " whether or not the person has been formally designated by Congress as an Officer of the

United States (Pet. App. A63-A64, quoting 424 U.S. at 125-126). Judge Beezer believed that the Council members do exercise such "significant authority," because the Administrator of BPA must act in a manner consistent with the Council's Plan and because the Council may block the acquisition of major power resources that are inconsistent with the Plan and disapprove additional sales to direct-service industrial customers (Pet. App. A64-A69).

ARGUMENT

The court of appeals correctly sustained the authority of the Pacific Northwest Electric Power and Conservation Planning Council, as presently constituted, to prepare and issue the model conservation standards provided for under the Northwest Power Act. Those standards are merely recommendatory, and they accordingly may be developed and issued by a body whose members are not appointed in the manner prescribed by the Appointments Clause of the Constitution. Although the opinion of the court of appeals contains language that appears to affirm the authority of the state-appointed Council to take other actions that would have a binding effect on the Administrator of BPA, those other powers of the Council are not involved in this case and it therefore was unnecessary for the court of appeals to address them.

The judgment below sustaining the model conservation standards and the Council's constitutional authority to issue them does not conflict with any decision of this Court or another court of appeals. Moreover, the Council, in response to a request by the Administrator, recently published a proposal to amend the model conservation standards in order to ensure that they meet the Act's cost-effectiveness and economic feasibility standards. Any amendments adopted

by the Council may moot some or all of petitioners' objections to the particular standards that were before the court of appeals. Especially in these changed circumstances, review by this Court is not warranted.

1. Petitioners contend (Pet. 11-20) that under the Appointments Clause of the Constitution, a body composed of members appointed by state governors cannot control a federal agency's execution of the laws. Accordingly, petitioners argue that the Council cannot perform *any* of the powers contemplated by the Northwest Power Act, including the issuance of the MCS. We disagree with petitioners as regards the issuance of the MCS, which is the only power of the Council that is involved in this case.

a. A federal law establishing a state-appointed council and authorizing it to take binding action to implement that federal law and to overrule the official actions of an Officer of the United States raises substantial constitutional questions. As petitioners stress (Pet. 15-16), the Constitutional Convention rejected a proposal that would have permitted Congress to vest in the governors of the several States the authority to appoint federal officers. 2 M Farrand, *The Records of the Federal Convention of 1787*, at 406, 407, 419 (rev. ed. 1966). Gouvernor Morris objected to that proposal because "[t]his would be putting it in the power of the States to say, 'You shall be viceroys but we will be viceroys over you'" (*id.* at 406).[5]

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[5] Before the motion was defeated, the Constitutional Convention deleted by consent a provision permitting the appointment power to be vested in the legislatures of the States, on the ground that "[i]f this be agreed to it will soon be a standing instruction from the State Legislatures to pass no law creating offices, unless the [appointments] be referred to them." 2 Farrand, *supra*, at 406.

Compare *Bowsher* v. *Synar*, No. 85-1377 (July 7, 1986), slip op. 10-11, 14-16. The proposal for state appointment of persons responsible for the execution of federal law was thus viewed by the Framers as inconsistent with the Constitution's division of responsibility between the States and the National Government, with the laws of the latter, administered by the Executive, being supreme. This Court stated in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), that "any appointee exercising significant authority pursuant to the laws of the United States" is an "Officer of the United States" required to be appointed in accordance with the Appointments Clause (424 U.S. at 126). Although Congress may in some circumstances require that a federal agency follow *state* law in carrying out certain of its functions (see, *e.g.*, *California* v. *United States*, 438 U.S. at 656-657), the grant to state-appointed persons of the power under *federal* law to veto the actions of an Officer of the United States may constitute the creation of federal officers in a manner that violates the Appointments Clause or an improper grant of federal executive power to persons who are not federal officers and therefore may not exercise such power.

b. The matter is further complicated as regards the Council by the question whether the method of its establishment properly constituted an interstate compact, such that the requirement that the Administrator respect the exercise of a veto by the Council might be analogized to subjecting the operation of a federal program to state law, as in *California* v. *United States*, *supra*. In the Northwest Power Act, Congress gave its consent to an agreement under which the Council would be established and its members would be appointed by the Governors of the four

Northwest States. 16 U.S.C. 839b(a)(2). Congress specified that the appointment of six initial members from at least three States by June 30, 1981 would constitute an agreement among those States (16 U.S.C. 839b(a)(2)). The four States then appointed the members by that deadline, thereby manifesting their assent in the manner specified by Congress.

On the other hand, the Council has a number of attributes that, especially when considered in combination, distinguish the Northwest Power Act from the typical interstate compact. First, the terms of the "agreement" were not the subject of negotiations among the participating States, such that the Council could be said to be the product of an independent meeting of the minds among contracting sovereigns. Instead, the Council's basic charter and the substantive and procedural standards by which it must operate were dictated in considerable detail by Congress itself in the Northwest Power Act.[6] Second, as Judge Beezer pointed out (Pet. App. A53-A57), in those areas in which its actions have independent legal force, the Council's sole function is to affect and in some circumstances veto the actions of a federal agency, BPA. By contrast, the Council does not have power to bind the four States in the administration of their own laws or to impose obligations directly on private persons in those geographic or subject-matter areas in which the four States have inherent but overlapping responsibilities—the circumstances

[6] The notion that the Council reflects an independent agreement among the States is further undermined by the fact that Congress specified that the appointment of Council members by at least three States would be deemed to constitute an agreement—a condition that could be satisfied by each State acting alone, rather than reciprocally. Compare *Northeast Bancorp, Inc.* v. *Board of Governors*, slip op. 14.

of traditional state concern that the Framers presumably contemplated would be the subject of the interstate compacts to which Congress might consent under the Constitution. Third, Congress confirmed the similarity between the Council and a federal agency by including a fallback mechanism under which the Secretary of Energy may appoint the members of the Council, who would then have precisely the same powers, if the States failed to appoint members at the outset or if that method of appointment were later held unconstitutional. 16 U.S.C. 839b(b). Compare *Bowsher* v. *Synar*, slip op. 19-20; *id.* at 15-16 (Stevens, J., concurring in the judgment).

c. For the foregoing reasons, the validity of some of the Council's powers presents novel and difficult constitutional questions. However, there is no occasion in this case to consider those questions. All that is involved here is the authority of the Council to issue the model conservation standards.

As petitioners concede (Pet. 6), nothing in the Northwest Power Act gives the Council authority to impose the MCS on state or local governments (see 16 U.S.C. 839g(a)) or on private persons. Nor do the MCS have a binding effect on the Federal Government. The Administrator of BPA is under no statutory obligation to adopt, approve, or enforce the MCS developed by the Council. The only "enforcement" mechanism related to the MCS is contained in 16 U.S.C. 839b(f)(2). That section authorizes the Council only to *recommend* that the Administrator impose surcharges on BPA customers within the jurisdictions of state or local governments that have not (or on customers that themselves have not) implemented conservation measures that achieve savings comparable to those attainable under the MCS.

The Act further provides that "the Administrator *may* * * * impose such a surcharge" (16 U.S.C. 839b (f)(2) (emphasis added)), thereby preserving to the Administrator the discretion to accept or reject the Council's recommendation.

Indeed, during congressional consideration of the Act, Representative Markey proposed an amendment that would have required the Administrator to impose the MCS surcharges recommended by the Council. But that amendment was defeated following the opposition of Representative Dingell, who stated (126 Cong. Rec. 29258 (1980)).

> This change would raise constitutional problems because the council is a State agency. * * * A State agency cannot, under the Constitution, require a Federal agency to take action of this nature. The provision would change that so that we would clearly have then an unconstitutional and undesirable result.

Congress's omission of any provision for giving binding effect to the Council's surcharge recommendation thus was quite deliberate.

By contrast, Congress's vesting of authority in a body composed of state-appointed members to make mere recommendations to a federal agency such as BPA does not raise constitutional problems under the Appointments Clause. In *Buckley* v. *Valeo*, the Court held that the power to receive, index and audit reports pertaining to federal elections—powers "essentially of an investigative and informative nature" (424 U.S. at 137)—could constitutionally be exercised by a Federal Election Commission that included members who were appointed by the Legislative Branch and who therefore did not serve in conformity with the Appointments Clause. Such pow-

ers, the Court reasoned, could even be delegated to a committee of Congress itself, in aid of its legislative functions. 424 U.S. at 137-138. The Council's powers involved in this case are to study possible conservation measures and to report its conclusions to the state and local governments, consumers of electric power, and the Administrator of BPA. While the state-appointed Council, which Congress specified "shall not be considered an agency * * * of the United States" (16 U.S.C. 839b(a)(2)(A)(iv)), may present somewhat different issues than an improperly appointed federal commission, the Council's functions with respect to the issuance of the MCS are in "an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not 'Officers of the United States'" (*Buckley* v. *Valeo*, 424 U.S. at 139), including persons appointed to office by state governors.[7] Compare 16 U.S.C. 1456(c)(3)(A) (state agency may interpose objection to federal permit for activity affecting land or water use in the coastal zone).

d. The Northwest Power Act does contain several other provisions that appear to vest the Council with authority that goes beyond merely making recommendations to the Administrator. In particular, the Council is granted an effective veto over increased sales of power by the Administrator to direct-service industrial customers (16 U.S.C. 839c(d)(3)) and over the acquisition by the Administrator of new power resources (16 U.S.C. 839d(c)). These provisions are not at issue in this case, and petitioners

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[7] A contrary conclusion would call into question the ability of Congress to establish a study commission having members appointed by Congress as well as the President. See, *e.g.*, 33 U.S.C. (1976 ed.) 1325 (National Study Commission under Federal Water Pollution Control Act).

do not have standing to challenge them. Petitioners are neither industrial customers seeking to purchase additional power from the Administrator in the face of disapproval by the Council, nor sponsors of a new generating or conservation resource that the Administrator would acquire but for a "veto" by the Council.

In fact, the Council has not yet sought to invoke these two statutory provisions in any context, and it is speculative whether the Council will ever do so. In view of the depressed state of the aluminium industry in the Pacific Northeast, it is unlikely that any existing direct-service industrial customer will seek to acquire additional power from the Administrator in the foreseeable future; and in view of BPA's projected power surplus and declining revenue base, it is unlikely that the Council would disapprove such a proposal. Moreover, the Administrator and the Council recently reached agreement concerning the types of power resources or conservation measures that must be submitted to the review process under 16 U.S.C. 839d(c) (see 51 Fed. Reg. 42028, 42902 (1986)), which should reduce the potential for disputes about whether the Administrator can acquire particular resources in the future. But however events might unfold, there is no occasion now for this Court to address the constitutionality of these statutory provisions, in the absence of a concrete controversy about their application.

2. Petitioners also argue (Pet. 24-30) that the MCS at issue here are invalid as a statutory matter because the Council applied an erroneous interpretation of the requirement in 16 U.S.C. 839b(f)(1) that the MCS must be "economically feasible for consumers." The United States did not take a position on this and other non-constitutional issues in the

court of appeals, and we accordingly do not discuss the merits of the statutory validity of the MCS here. We do suggest, however, that this issue, which arises only under the Northwest Power Act and affects only the four States in the Pacific Northwest, does not warrant review by this Court. That is especially so in light of developments since the court of appeals rendered its decision—developments that also weigh against review at this time of the Appointments Clause issue petitioners raise.

In 1986, in response to the Council's 1985 revision of the MCS (see note 4, *supra*), BPA initiated an independent evaluation of the Council's suggested MCS "packages." In performing this analysis, BPA utilized empirical data from its Residential Standards Demonstration Program. These data, which consist in large part of thermal performance observations of homes built to the Council's suggested MCS specifications, were unavailable to the Council and the court of appeals when they considered the particular version of the MCS now before the Court.

On October 2, 1986, BPA released for public review a technical paper containing the findings of its study. As relevant here, those findings are: (i) that the thermal performance goals reflected in the MCS are attainable in a manner that satisfies the statutory requirements of cost-effectiveness and economic feasibility; (ii) that the particular packages of measures suggested by the Council for achieving the MCS thermal performance goals do not entirely meet the the statutory criterion of cost-effectiveness; and (iii) that other, slightly different packages for the several climatic zones in the region would meet the statutory requirements at a lower cost. In particular, BPA found that the most expensive measures suggested by the Council, and the ones most objectionable to petitioners—the air infiltration package—could be

deleted and replaced with less expensive measures, which would still achieve the Council's desired thermal performance levels. Moreover, under the new MCS specifications advanced by BPA, *each* measure satisfies the cost-effectiveness criterion, which eliminates one of petitioners' principal objections in the court of appeals (Pet. App. A34-A35). In fact, under the new MCS packages developed by BPA, present value costs for new homes are (with only minor exceptions) the same as or less than the costs of comparable homes built to existing standards.

In response to BPA's announcement, the Council voted on November 13, 1986 to offer for public comment proposed amendments to the MCS based on BPA's findings. See 51 Fed. Reg. 42031 (1986). On November 18, 1986, the Administrator of BPA sent a letter to BPA's customers informing them that "no Surcharge Policy will be finalized until after the Council completes [its] rulemaking process."[8] In light of these developments, there is not a substantial and concrete controversy regarding the particular MCS that are now before the Court, even assuming that the question of the validity of the MCS might warrant review in an appropriate case.[9]

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[8] We have lodged with the Clerk of this Court a copy of the Administrator's letter and the technical paper released by BPA on October 2, 1986.

[9] Petitioners also object (Pet. 21-24) to the Council's failure to prepare an environmental impact statement (EIS), pursuant to either state or federal law, when it issued the MCS. In our view, the court of appeals' conclusion that the environmental laws of the four States do not apply to the Council's preparation of the MCS (Pet. App. A44-A45) reflects a reasonable interpretation of the Northwest Power Act, especially in light of the failure of the States to reserve the right to apply their environmental statutes when they agreed to formation of the Council and the potential burden that would be

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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imposed on the Council if it were required to comply with the perhaps divergent laws of several States in preparing a region-wide plan.

We also agree with the court of appeals that no EIS was required under NEPA (Pet. App. A45-A46). That aspect of NEPA applies only to the actions of "agencies of the Federal Government" (42 U.S.C. 4332). Congress expressly mandated that, except as otherwise provided in the Northwest Power Act, the Council "shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law" (16 U.S.C. 839b(a)(2)(A)(iv)), and NEPA is not among the federal laws that Congress made applicable to the Council under the Northwest Power Act (see 16 U.S.C. 839b(a)(4)). Moreover, as the court of appeals concluded (Pet. App. A45-A46), the MCS do not have a significant impact on the quality of the human environment, because they are only proposals, upon which the Administrator may or may not base a rate surcharge.

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